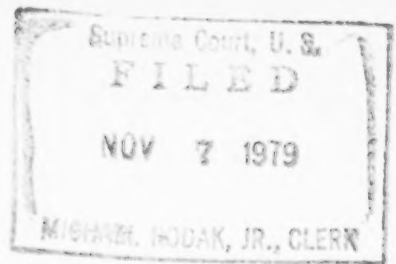


79-732

No. _____



IN THE SUPREME COURT
OF THE UNITED STATES

FRED W. PHELPS, SR.,

Petitioner,

adv.

THE STATE OF KANSAS,

Respondent.

* * * * *

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE UNITED STATES
(To the Supreme Court of Kansas)

* * * * *

Robert D. Ochs, Esq. of
FISHER, RALSTON, OCHS & HECK, P.A.
1321 S. Topeka Blvd.
P. O. Box 1677
Topeka, Kansas 66601
(913) 354-7621
ATTORNEYS FOR PETITIONER

TABLE OF CONTENTS

Opinion Below -----	1
Jurisdiction -----	2
Questioned Presented -----	3
Constitutional Provisions, Statutes and Regula- tions Involved -----	4
Statement of the Case -----	13
Review of the Judgment of the State Court (Federal Question Raised) -----	21
Argument for Allowance of Writ -----	25
Conclusion -----	42
Copy of <u>State v. Phelps,</u> 226 Kan. 371 (1979) -----	
Appendix "A"	
Rule No. 7.06 -----	
Appendix "B"	
Order of Supreme Court of State of Kansas denying Amended Motion for Stay, <u>State of Kansas v.</u> <u>Fred W. Phelps, Sr., Case No.</u> 50,834, dated August 30, 1979 -----	
Appendix "C"	

Order Granting Motion for Preliminary Injunction in Part and Denying the Balance Thereof, Phelps v. The Kansas Supreme Court, et al, Case No. 79-1381, filed August 17, 1979 -----

Appendix "D"

TABLE OF CASES

<u>Bates v. State Bar of Airzona,</u> 433 U.S. 350 (1977) -----	28
<u>Doe v. Pringle,</u> 550 F.2d 596 (10th Cir. 1976) -----	27
<u>In re Gault,</u> 387 U.S. 1, 33 ---	32
<u>In re Primus,</u> 436 U.S. 411 (1978) -----	28
<u>In re Ruffalo,</u> 390 U.S. 544 (1967) -----	29
	31, 32
<u>Mayes v. Honn,</u> 542 F.2d 822, 823 (10th Cir. 1977) -----	28
<u>Miller v. Schweickart,</u> 413 F. Supp. 1059 (S.D.N.Y. 1976) ----	39
<u>Ohralik v. Ohio State Bar</u> <u>Association,</u> 436 U.S. 447 (1978) -----	28
<u>Phelps v. Kansas Supreme</u> <u>Court, et al, Case No. 79-1381</u> <u>in the United States District</u> <u>Court for the District of</u> <u>Kansas</u> -----	20

Robinson v. Brady, Case No. 125, 742, in the District Court of Shawnee County, Kansas -----	13 41
---	----------

Scotland County v. Hill, 112 U.S. 183, 5 S.Ct. 93, 28 L.Ed. 692 -----	40 41
---	----------

TABLE OF STATUTES CITED

K.S.A. 60-211 -----	9 38
K.S.A. 60-216 -----	33
Rule 16, F.R.Civ.P. -----	33
28 U.S.C. § 1257(3) -----	3
28 U.S.C. § 2101(c) -----	3

TABLE OF OTHER AUTHORITIES

DR7-102(A)(1), ABA Code of Ethics-	30
------------------------------------	----

Rules Relating to the Admission, Discipline and Disbarment of Attorneys, 220 Kan. lxxxiii - xcix, Rule 223 -----	8
---	---

Rules Relating to Discipline of Attorneys, 224 Kan. lxxi - cx:	
--	--

Rule 211(f) -----	5
Rule 212(e)(5) -----	6

Rule 216(d) -----	6
Rule 216(e) -----	6
Rule 222(a) -----	7
Rule 222(b) -----	7

Rules Relating to Supreme Court, Court of Appeals and Appellate Practice, Rule No. 7.06 -----	3 1, 2
---	-----------

Rules 19, <u>et seq.</u> , of the Supreme Court of the United States Revised Rules, 28 U.S.C.A. -----	3
--	---

Rules of the Supreme Court of the United States Revised Rules, 28 U.S.C.A.:	
---	--

Rule 23(d) -----	5
Rule 23(h) -----	25

United States Constitution, First Amendment -----	10
--	----

United States Constitution, Fourteenth Amendment -----	10
---	----

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF KANSAS

TO: The Honorable Chief Justice, and the
Honorable Associate Justices of the
Supreme Court of the United States:

Petitioner, Fred W. Phelps, Sr.,
prays that a Writ of Certiorari be issued
to review the judgment order of the Supreme
Court of the State of Kansas in the above
case finalized August 30, 1979.

A. Opinion Below

The official report of the opinion
of the Kansas Supreme Court appears at
226 Kan. 371, and a copy of said opinion
is attached hereto and incorporated herein
as Appendix "A".

Rule No. 7.06 of the "Rules Relating
to Supreme Court, Court of Appeals and
Appellate Practice", which regulates
appellate practice in the State of Kansas,
provides in essence that opinions of the
Supreme Court do not become effective, and
a final mandate is not entered, until

twenty (20) days following the date of
the decision. The text of said Rule,
Rule No. 7.06, is attached hereto and
incorporated herein as Appendix "B".

In addition, the Petitioner herein
filed a Motion to Stay (which was amended
shortly after it was filed) before the
Supreme Court of Kansas, requesting that
the Supreme Court's opinion of disbarment
be stayed pending the outcome of a
federal action challenging the constitu-
tionality of certain aspects of the
Supreme Court's opinion. The Supreme Court
of Kansas denied the amended motion for
stay on August 30, 1979. A copy of that
final order denying the amended Motion for
Stay is attached hereto and incorporated
herein as Appendix "C".

B. Jurisdiction

The date of the final judgment sought
to be reviewed is either August 9, 1979
or August 30, 1979. It is the position
of Petitioner that the final date was
August 30, 1979, when Petitioner's amended
Motion for Stay was denied. At the very

earliest, the Supreme Court's opinion became final twenty (20) days after July 20, 1979, or August 9, 1979. See Rule No. 7.06 of the "Rules Relating to Supreme Court, Court of Appeals and Appellate Practice", Appendix "B".

The statutory provisions believed to confer on this Court jurisdiction to review the judgment or decree in question by Writ of Certiorari are: Rules 19, et seq., of the Supreme Court of the United States Revised Rules, 28 U.S.C.A.; 28 U.S.C. § 1257(3); 28 U.S.C. § 2101(c); and any other statutory or common law basis not specifically cited, which confers jurisdiction in this Court to review by Writ of Certiorari actions taken by high courts of a state which are alleged to be unconstitutional.

C. Questions Presented

Petitioner believes the questions presented for review can be fairly stated as follows:

1. Whether Petitioner was denied procedural due process during the course

of disciplinary proceedings before the Supreme Court of Kansas.

2. Whether Petitioner was denied substantive due process during the course of disciplinary proceedings before the Supreme Court of Kansas.

3. Whether the Rules of the Kansas Supreme Court Relating to Discipline and Disbarment of Attorneys, as applied to Petitioner, are unconstitutional.

4. Was Petitioner denied vital constitutional rights, including First Amendment and Fourteenth Amendment rights?

D. Constitutional Provisions, Statutes and Regulations Involved

The disciplinary proceedings effected against Petitioner in the State of Kansas were done pursuant to certain Rules adopted by the Supreme Court of Kansas. After the proceedings were commenced, but before the conclusion of the proceedings, some of the Rules were changed. The Rules are lengthy. The Rules in effect, when the disciplinary action was commenced,

were entitled "Rules Relating to the Admission, Discipline and Disbarment of Attorneys", and may be found officially reported at 220 Kan. lxxxiii - xcix; cix - cxxvii. Effective January 8, 1979, the Rules were amended in part, the Rules thereafter being referred to as "Rules Relating to Discipline of Attorneys", and those Rules may be found officially reported at 224 Kan. lxxi - cx. Petitioner generally challenges the constitutionality of these Rules as applied to him.

To satisfy the specific requirements of United States Supreme Court Rule 23(d), 28 U.S.C.A. p. 47, Petitioner will set forth verbatim those Rules primarily involved herein. Said Rules will be set out verbatim followed by reference to the official citation.

Rule 211(f)

"(f) At the conclusion of a hearing held by a panel, a report shall be made to the Disciplinary Board setting forth findings and recommendations, which report shall be signed by a majority of the panel and

submitted to the Board. To warrant a finding of misconduct the charges must be established by clear and convincing evidence. * * * (Emphasis supplied). 224 Kan. lxxvi

Rule 212(e)(5)

"(e) If the respondent files exceptions the following steps shall be taken: * * *

(5) The matter shall be set for hearing and heard on the merits. (Emphasis supplied). 224 Kan. lxxxvii

Rule 216(d)

"(d) Upon request, the Disciplinary Administrator shall disclose to the respondent all evidence in his possession relevant to the proceeding. No other discovery shall be permitted. (Emphasis supplied). 224 Kan. lxxxviii

Rule 216(e)

"(e) At the discretion of the hearing panel, a pre-hearing conference may be ordered for the purpose of obtaining admissions or otherwise narrowing the issues presented by the pleadings. Said conference may be held

before the chairman of the panel or any member of the panel designated by its chairman." 224 Kan. lxxxviii*

Rule 222(a)

"(a) All proceedings, reports and records of disciplinary investigations and hearings, except as hereinafter provided, shall be private and shall not be divulged in whole or in part to the public except by order of the Supreme Court. * * *"
224 Kan. xci

Rule 222(b)

"(b) All persons violating subsection (a) may be subject

*Petitioner does not challenge the propriety of this Rule per se. However, as the Rule was used herein, it was unconstitutional. As the "Statement of the Case" below will show, a prehearing conference was conducted during which the issue was severely limited. Petitioner proceeded at the hearing based on the limited issue, and presented evidence on that issue. However, the Supreme Court of Kansas thereafter based their opinion of disbarment on many, many matters outside that issue.

to punishment for contempt of the Supreme Court. * * *"
224 Kan. xci

Rule 223

"(a) All proceedings, reports and records of disciplinary investigations and hearings other than proceedings before the Supreme Court shall be private and shall not be divulged in whole or in part to the public except by order of the Court.

(b) Any person violating paragraph (a) may be subject to punishment for contempt of Court." 220 Kan. xcii*

*Rule 223, 220 Kan. xcii, was the Rule in force and effect when the disciplinary proceeding herein was commenced. It was changed during the course of the proceeding.

In addition, K.S.A. 60-211 is involved herein, and that statute provides:

"Signing of pleadings. Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address and telephone number shall be stated. A party who is not represented by an attorney shall sign his pleading and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good grounds to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this section, it may be stricken as sham and false and the action may proceed as though the pleading has not been served. For a willful violation of this section an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if

scandalous or indecent matter is inserted."

Petitioner also believes that at a minimum the First Amendment of the United States Constitution and the Fourteenth Amendment of the United States Constitution are involved, and those amendments provide respectfully:

First Amendment

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Fourteenth Amendment

"§ 1. Citizenship; privileges or immunities; due process clause. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities

of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

§ 2. Apportionment of Representatives. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

§ 3. Disqualification for office by insurrection or rebellion. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

§ 4. Validity of debts. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation

of any slave; but all such debts, obligations and claims shall be held illegal and void.

§ 5. Enforcement of amendment. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

E. Statement of the Case

The instant Petition for Writ of Certiorari emanates from an original action in discipline before the Supreme Court of Kansas.

The disciplinary action commenced following alleged wrongdoing by Petitioner during the trial, and post-trial motions, of Robinson v. Brady, Case No. 125,742 in the District Court of Shawnee County, Kansas. During the course of said trial, Petitioner made certain proffers of what he expected certain prospective witnesses to testify. The trial court in Robinson refused to allow those persons to testify. Following the trial,

and a verdict for the defendant Brady, Petitioner filed a motion for new trial, urging in part that the trial court had erred in disallowing those witnesses to give testimony.

Several months after the fact, the Disciplinary Administrator of the State of Kansas gathered certain affidavits from some of the individuals whose testimony had been proffered, which affidavits claimed that the individuals would not give testimony precisely as Petitioner expected they would. Disciplinary proceedings were commenced against Petitioner alleging that Petitioner had intentionally and knowingly made false statement of fact to the court.

On March 13, 14, and 15, 1978, a hearing was conducted before a Panel of the State Board of Law Examiners on that complaint. However, before that hearing, several prehearing conferences had been conducted. During the prehearing conferences, the issue was limited substantially. The issue was formulated as follows:

" . . . The issue in this case is as to whether the Respondent made false statements to the

court in his proffered testimony and in his motion for a new trial when the Respondent referred to his knowledge of and the nature of the testimony which would be presented by the witnesses named in paragraphs 1a, 1b and 1c of the complaint. The Panel Chairman further rules that the issue of the ultimate truth of the proffered testimony is not before the Hearing Panel but the question is as to whether or not Fred Phelps knowingly made false statements of law or fact as to the testimony of the proffered witnesses;" (February 9, 1978 Pretrial Conference, see 226 Kan. at 375 [Appendix "A"])).

On March 2, 1978 the issue was again stated by the Chairman of the Hearing Panel, further changing the delineation of the issue, as follows:

" . . . The only issue here is as to whether or not [there was a reasonable basis or probable cause for Fred Phelps to believe that] the witnesses listed in the complaint would have testified in the manner in which Mr. Phelps indicated in his paragraph 1(a), (b), and (c) of his motion for a new

trial. * * *

But, again, the issue is not going to be as to the ultimate truth, but whether or nor Fred Phelps, Sr., had a reasonable basis for making the allegations or the proffers of certain testimony; or whether he willfully made a false statement. * * *

It's really going to boil down to this, did somebody tell Fred Phelps that such and such a person would testify to such and such a way I don't care whether that person had any basis for what he told Fred Phelps. I am not going into that, as to whether it was true or false, but at this particular time, did he have reason to believe that Dan Turner would testify in this manner if called, and so on down the line."

Prior to this limitation of the issues, Petitioner had filed a witness and exhibit list which was rather lengthy in nature. Such witnesses and anticipated evidence went to other areas, including actual occurrences during the Robinson v. Brady trial, the truth of the proffers made, etc. In addition, evidence and testimony

was going to be offered concerning the occurrences which led up to the Robinson v. Brady lawsuit, and the filing thereof. Carolene Brady herself was to be a witness; and evidence was anticipated relative to the credibility of Carolene Brady. All evidence and witnesses which were to be used for other issues believed involved were stricken, and the witness and exhibit list was ordered modified by the Panel, because the Panel restricted the issue as narrowly set forth above.

As already stated, a Panel Hearing was conducted in March of 1978. A Panel Report was issued, *with the only recommendation of discipline being public censure*, large part of which is set forth in the opinion of the Supreme Court of Kansas, 226 Kan. at 376, 377 and 378, see Appendix "A".

Thereafter, the matter was transferred to the Supreme Court of Kansas and the parties filed respective briefs. There was never a hearing on the merits before the Supreme Court of Kansas. The only thing afforded Petitioner before the Supreme Court of Kansas was approximately thirty (30) minutes of oral argument, for all intents and purposes nothing more than appellate arguments. Thereafter, the Supreme Court of Kansas issued an opinion

(Appendix "A"), and the opinion ordered disbarment of this Petitioner. (*It should be noted that the Panel's recommendation was public censure*). A fair reading of the opinion of the Supreme Court of Kansas shows that the disbarment is based in substantial part on what the Supreme Court of Kansas conceived to be "abusive, repetitive, irrelevant" cross-examination of the defendant Carolene Brady; a "classic case of 'badgering' a witness"; and Petitioner having a "personal case". These "findings" were made without the presentation of evidence or chance on behalf of Petitioner Fred Phelps to present rebuttal evidence. The Supreme Court of Kansas also complained that Petitioner filed a motion for a new trial and eventually filed an appeal on behalf of Sherman Frederick Robinson from the jury's verdict for the defendant. For example the Supreme Court of Kansas says: "The jury verdict didn't stop the onslaught of Phelps. He was not satisfied with the hurt, pain, and damage he had visited on Carolene Brady. He filed a motion for a new trial, . . .". In fact, the Supreme Court of Kansas admittedly went beyond the issue framed at the prehearing conference, and reverted back to the original complaint

lodged against this Petitioner. (See 226 Kan. at 379, Appendix "A"). The Supreme Court of Kansas did so to justify its "findings" that this Petitioner in cross examining Carolene Brady and in representing his client had a "personal vendetta . . . against Carolene Brady", and that his examination "was replete with repetition, badgering, innuendo, belligerence, irrelevant and immaterial matter evidencing only a desire to hurt and destroy the defendant". The Supreme Court went on to find that Petitioner's action therein held "Mrs. Brady up to unnecessary public ridicule".

Following the Supreme Court's opinion, Petitioner filed a Complaint in the United States District Court for the District of Kansas, said Complaint being filed July 31, 1979. All Federal Judges in the United States District Court for the District of Kansas disqualified themselves from hearing said action, and the action was thereafter assigned to the Honorable Clarence Brimmer, United States District Judge for the District of Wyoming. Shortly following the filing of said action, a hearing was conducted before The Honorable

Clarence Brimmer, and following the hearing and on August 17, 1979 Judge Brimmer filed an "Order Granting Motion for Preliminary Injunction in Part and Denying the Balance Thereof". The text of said Order, filed August 17, 1979, in the case of Phelps v. The Kansas Supreme Court, et al, Case No. 79-1381 in the United States District Court for the District of Kansas, is set forth and incorporated herein by this reference as Appendix "D", which is attached hereto and incorporated herein. That Order granting injunctive relief is still in effect.

On October 31, 1979, the Honorable Clarence Brimmer filed an Order dismissing Case No. 79-1381. The dismissal was based, in large part, because Petitioner had not exhausted all of his legal remedies. Specifically, Judge Brimmer stated:

" . . . Plaintiff had the right under 28 U.S.C. § 1257(2) or 28 U.S.C. § 1258(3) [sic] to petition the Supreme Court of the United States to take the case on appeal or upon writ of certiorari. Plaintiff has failed to exhaust his legal remedies. For the above reasons, the relief requested

by the Plaintiff is inappropriate."

F. Review of the Judgment of
the State Court (Federal
Question Raised)

As the summarization of the "Statement of the Case" illustrates, the procedural background of this case is involved. There have been numerous instances where Petitioner has raised and reserved constitutional challenges. Those instances include but are not necessarily limited to the following:

(1) Petitioner's Motion to be allowed discovery during the disciplinary procedure;

(2) Petitioner's exceptions filed with the Supreme Court of Kansas wherein Petitioner "excepted" to the Panel Report;

(3) Petitioner's Brief before the Supreme Court of Kansas;

(4) Petitioner's oral argument before the Supreme Court of Kansas, through counsel;

(5) Petitioner's filing of Case No. 79-1381 in the United States District Court for the District of Kansas; and,

(6) Petitioner's motion to dismiss or for summary judgment filed both with the Hearing Panel and the Supreme Court, as well as motions to dismiss lodged at the conclusion of the evidence presented, all of which motions challenged the legal and constitutional propriety of the so-called "ethical" violations alleged by the State of Kansas.

In addition, it must be noted that perhaps the most important due process deprivation occurred at the Supreme Court of Kansas level. Specifically, Petitioner is referring to the denial of an opportunity to be fully advised and notified of the charges against him. As already indicated in the "Statement of the Case", the issue before the Hearing Panel was narrowly defined during prehearing procedures. Based on those stated issues, and the narrowing of the issues, Petitioner voluntarily, at the strong suggestion of

the Chairman of the Hearing Panel, modified and amended the witness and exhibit list by substantially pruning that list, and then proceeded during evidentiary hearing to present evidence only on the narrowly defined issue. In fact each time Petitioner would come close to going outside the issue, the State of Kansas would object and the objections would be sustained. Thereafter, the Supreme Court of Kansas, on its own admission (226 Kan. at 379) ignored the narrowly defined issue of the Hearing Panel, and reverted to the broadly worded formal complaint originally filed against Petitioner, in reaching its decision to disbar this Petitioner. Thus, it was not until Petitioner was faced with the opinion of the Supreme Court of Kansas was Petitioner cognizant of the fact that Petitioner was going to be disbarred by the Supreme Court of Kansas on matters totally outside the issues as framed by the Hearing Panel during prehearing conference sessions, and totally outside the issues as defined and enforced during presentation of evidence and arguments. Immediately thereafter, Petitioner raised this federal

constitutional deprivation by the filing of Case No. 79-1381 in the United States District Court for the District of Kansas.

Thus, the federal questions contained herein have been raised throughout these proceedings, timely, and raised both orally and in written form. The constitutional challenges have been overruled at every stage. Petitioner honestly believes that he has raised each federal question as timely as possible and as properly as possible under the circumstances. Therefore, this Court has jurisdiction to review the judgment at issue on a writ of certiorari.

G. Argument for Allow-
ance of Writ

Petitioner understands that this is a petition and not a brief. Petitioner will therefore attempt to be as concise as possible. (See Supreme Court Rule 23[h]). Petitioner believes that numerous substantial constitutional violations have occurred. Not all of these constitutional deprivations will be discussed herein -- only the more blatant.

Before doing so, Petitioner desires to call this Court's attention to a very important document. That document is the Complaint filed July 31, 1979 in the United States District Court for the District of Kansas. The document is excessively bulky, and therefore has not been made an appendix to this Petition. However, pursuant to prior arrangements with the Clerk of this Court, the Court is hereby advised that a full and complete copy of that Complaint, which includes the body of the Complaint, attached Memorandum of Law, and other attached Appendices, is presently lodged

with the Clerk of the United States Supreme Court and is available for reading by the Court. PETITIONER WOULD BEG OF THIS COURT THAT EACH MEMBER OF THIS COURT CAREFULLY READ THAT COMPLAINT IN CASE NO. 79-1381 BEFORE A DETERMINATION IS MADE ON WHETHER OR NOT THIS PETITION FOR WRIT OF CERTIORARI IS GRANTED! That Complaint contains an exhaustive discussion of the various rules relating to discipline of attorneys and the various constitutional violations which Petitioner believes to exist. A reading of that Complaint will both (1) assist the Court in having a better understanding of this litigation; and, (2) assist the Court in having a better understanding of the constitutional questions involved. That Complaint also contains a Memorandum of Law which Petitioner believes fairly summarizes many aspects of the law involved herein.

With respect to specific reasons why this Writ should be allowed, Petitioner submits:

(1) The Honorable Clarence Brimmer has suggested that the proper forum for review is the United States Supreme Court;

(2) The Supreme Court of Kansas has made a decision probably not in accord with applicable decisions of this Court;

(3) The Supreme Court of Kansas has made a decision which has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

These enumerated reasons will be discussed serially:

1. The Honorable Clarence Brimmer has suggested that the proper forum for review is the United States Supreme Court

As already noted, the Honorable Clarence Brimmer recently dismissed Case No. 79-1381, in part, because Petitioner had not petitioned this Court for a Writ of Certiorari. In addition to that portion of Judge Brimmer's opinion already quoted, Judge Brimmer had this to say:

"As indicated by the Court in Doe v. Pringle, (550 F.2d 596 [10th Cir. 1976]) the only federal court that may review the proceedings of the Kansas Supreme Court is the United States Supreme Court. We do

not have the authority to review the proceedings of the Kansas Supreme Court in the matter of the disbarment of Fred Phelps. Mayes v. Honn, 542 F.2d 822, 823 (10th Cir. 1977). That the United States Supreme Court will and does review disciplinary proceedings of state supreme courts is shown by the number of such cases recently before the Supreme Court. Bates v. State Bar of Arizona, 433 U.S. 350 (1977), Ohralik v. Ohio State Bar Association, 436 U.S. 447 (1978), In re Primus, 436 U.S. 411 (1978). All of those proceedings, reached the United States Supreme Court on writ of certiorari from the state courts." (Emphasis supplied).

Petitioner views Judge Brimmer's comments as soliciting this Court to grant a petition for writ of certiorari.

2. The Supreme Court of Kansas has made a decision probably not in accord with applicable decisions of this Court
3. The Supreme Court of Kansas has made a decision which has so far departed from the accepted and

usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision

To intelligently discuss this aspect, one must examine "decisions of this Court" which are applicable. One of the most oft-cited cases of recent vintage is In re Ruffalo, 390 U.S. 544 (1967). The United States Supreme Court, in Ruffalo, supra, discussed the so-called "trap" situation. Petitioner believes that he has been "trap[ped]" by the procedural background of this litigation. Specifically, Petitioner refers to the Panel's narrowing of the issue, Petitioner's reliance upon that narrowing of the issue, and the Supreme Court's subsequent action taken against Petitioner outside the scope of the defined issues. It cannot be questioned but that the Supreme Court of Kansas went outside the issues of the prehearing conference. The Supreme Court of Kansas, at 226 Kan. at 379, after noting that the Panel had declined to make a finding as to whether or not a "personal vendetta" existed, said:

"The Panel declined to make such a specific finding. We, however, are not bound by the failure to make such a finding. The formal complaint lodged against Phelps states:

'That the motion for new trial (Attached J) clearly misrepresents the truth to the court and holds a defendant up to unnecessary public ridicule for which there is no basis in fact.'" (226 Kan. at 379). (Emphasis supplied).

The Supreme Court of Kansas straightaway proceeded to find that a violation of DR7-102(A)(1), ABA Code of Ethics, existed. Accordingly, it is clear that the Kansas Supreme Court admits that they have gone outside the issue framed and the issue tried, have instead reverted to the original formal complaint which had been superseded by pretrial proceedings, and based upon that complaint had found violations of a certain Disciplinary Rule which supported a finding of disbarment.

This Court must then look at the actions of the Kansas Supreme Court in light of this Court's solid pronouncements in the Ruffalo case. Mr. Ruffalo had been disbarred by the Supreme Court of Ohio on a charge which he had not known when he went to hearing. In Ruffalo, the charge "for which petitioner stands disbarred was not in the original charges made against him. It was only after both he and Orlando had testified that this additional charge was added". (390 U.S. at 549). Here, it was only after the entire evidentiary hearing had been concluded, after the Panel had made its Report, and after the Supreme Court had the matter under advisement, that additional charges were made against this Petitioner.

In Ruffalo, there was "no de novo hearing before the Court of Appeals". (390 U.S. at 549). Here, while there was supposed to be a "hearing on the merits" before the Supreme Court of Kansas, there was none. During oral arguments before the Supreme Court of Kansas, not one word was raised by the Court and not one question made. No notice or indication was given that the issues would be

expanded, and obviously no opportunity to be heard on those issues was granted. Instead the Supreme Court of Kansas simply took the matter under advisement after oral arguments and thereafter issued their order, making findings upon which no evidence had been presented, and determining issues which were not bona fide.

A portion of the Ruffalo opinion fits precisely with this situation. That portion follows:

"In the present case petitioner had no notice that his employment of Orlando would be considered a disbarment offense until after both he and Orlando had testified at length on all the material facts pertaining to this phase of the case. As Judge Edwards, dissenting below, said, 'such procedural violation of due process would never pass muster in any normal civil or criminal litigation.' 370 F.2d at 462.

These are adversary proceedings of a quasi-criminal nature. C.f. In re Gault, 387 U.S. 1, 33. The charge must be known before the proceedings commence. They

become a trap when, after they are underway, the charges are amended on the basis of testimony of the accused. He can then be given no opportunity to expunge the earlier statements and start afresh.

How the charge would have been met had it been originally included in those leveled against petitioner by the Ohio Board of Commissioners on Grievances and Discipline no-one knows.

This absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges deprived petitioner of procedural due process.
(Emphasis supplied).

The Rules Relating to Discipline of Attorneys in the State of Kansas recognize that, unless otherwise provided, the Rules of Civil Procedure control. Those Rules include K.S.A. 60-216, the counterpart of Rule 16, F.R.Civ.P., relating to pretrial conferences. Indeed the Rules Relating to Discipline of Attorneys by their very text call for prehearing conferences. The purpose of the prehearing conference is to reduce issues

and to fully advise the parties prior to the hearing what issues are involved. That is what was done here. The Supreme Court, in thereafter expanding those issues, created a "trap" for Petitioner which in essence disallowed Petitioner to present any evidence or in any way have opportunity for hearing on issues which eventually were used to order disbarment of Petitioner. This absence of fair notice as to the true "reach" of the disciplinary proceedings and as to "the precise nature of the charges" deprived this Petitioner of his procedural due process.

Such constitutional deprivations cannot be allowed, and it is quite clear that only this Court can provide relief. Petitioner attempted to obtain relief from the United States District Court for the District of Kansas, but was instructed to seek relief here. Only this Court remains as an avenue available to this Petitioner for a remedy of the wrong done.

A reading of the opinion of the Supreme Court further reflects that the disbarment was based in large part over what was considered "badgering" of a witness. Without question, this case presents a first in Anglo-Saxon jurisprudence, to wit: disbarment of an attorney because of cross-examination of an adverse party. The Supreme Court also criticizes Petitioner for obtaining affidavits and attempting to file affidavits which supported the proffers made. The Supreme Court of Kansas further, with absolutely no evidence, suggests that this Petitioner was conducting a "personal vendetta" and although technically this Petitioner had a client, the litigation was really that of this Petitioner and not the client. The Supreme Court of Kansas finds that Petitioner's examination of the defendant was "replete with repetition, badgering, innuendo, belligerence, irrelevant and immaterial matter evidencing only a desire to hurt and destroy the defendant", although at all times during the proceedings Carolene Brady was represented by competent counsel, and the examination

took place in front of a trial judge. Nowhere in the record does the trial court find improper cross-examination. Nor were any warnings or reprimands issued to counsel by the trial court judge. Rarely in the record does Carolene Brady's attorney object. Yet the Supreme Court of Kansas, reviewing the cold record months later, in considering matters not even before them, finds the cross-examination to be "badgering". All of these areas and all of these findings were outside the scope of the issues tried.

But beyond that, all of these findings and rulings by the Supreme Court of Kansas go so far beyond the accepted and usual course of judicial proceedings as to require that this Court exercise its power of supervision. Never before has an attorney been disbarred for "badgering" a witness. Never before has an attorney been disbarred for conducting a "personal vendetta". Etcetera. Petitioner feels that a fair reading of the opinion of the Supreme Court of Kansas by this Court will convince this Court of the necessity of supervision.

In addition, these areas present substantial questions of First Amendment rights, specifically the right of Petitioner to speak and practice a profession (i.e.,

examining witnesses, etc.) and to associate (i.e., obtain affidavits, etc.). These First Amendment rights of the Petitioner have been denied by the Supreme Court of Kansas.

There is another area where Petitioner believes the Supreme Court of Kansas has acted in a fashion not in accord with applicable decisions of this Court and in a fashion so far removed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision. That area has to do with the apparent finding by the Supreme Court of Kansas that Petitioner did not believe the proffers made. In fact, never has there been a finding that the proffers were not true. Nor has there been a finding that Petitioner did not in good faith actually himself believe that the proffers were true. It is totally improper and patently unfair to disallow an attorney who has proffered testimony to put the witnesses on the witness stand at the time the proffer is made, on the one hand, and to thereafter many months after the fact allow a disciplinary administrator,

with inquisitional-type powers, to attempt to prove that those witnesses would not at the time the proffers were made have had such testimony. The only true question which should have been addressed was whether or not this Petitioner knew or believed that the proffers were false at the time that they were made. If Petitioner believed the proffers to be true, as the record abundantly showed, it is not an ethical matter that perhaps another attorney under similar circumstances would not have believed the proffers. There was never a finding that Petitioner did not believe the proffers. The essence of the findings of both the Panel and the Supreme Court of Kansas was that Petitioner should not have believed the proffers, or stated another way, that a "reasonable lawyer" under similar circumstances would have not believed the proffers. This, of course, is the language of negligence -- not intentional ethical violations or misstatements.

Further, the Supreme Court of Kansas found a Rule 11 (K.S.A. 60-211) violation, although there was never a finding made of any falsity. Before Rule 11 violations

can even be discussed, there has to be a determination made in the forum where statements are made that those statements are false. Miller v. Schweickart, 413 F.Supp. 1059 (S.D.N.Y. 1976). See Risinger, D. Michael, Honesty in Pleading and Its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11, 61 Minn. L.R. 1 (1976). As the case law and the just-cited law review article reveal, and indeed the very text of Rule 11 itself reveals, the sine que non of a Rule 11 violation is a finding of falsity. The Panel during the disciplinary hearing expressly held that the issue was not whether or not the proffers were true. Nor was Petitioner ever allowed to offer evidence on the truthfulness of the information proffered. How in the world, then, could there be a finding of falsity made to support a so-called Rule 11 violation? This is just another example of the Supreme Court of Kansas' violating the procedural due process rights of this Petitioner.

In addition, this Court should take note of the fact that there has never (to this writer's knowledge) been a case

or a proceeding where an attorney was disbarred pursuant to Rule 11, even assuming that it had been shown that allegations made by an attorney were false, in the forum where those allegations were made. Instead, the case law under Rule 11 deals with "striking" pleadings which are false. Before pleadings can be stricken as false they have to be found to be false or unfounded. No such finding was ever made here, and in fact no effort was ever made to strike the motion for new trial from the file.

Finally, with respect to the proffers, Petitioner submits that the action taken by the Supreme Court of Kansas is in direct contradiction of this Court's ruling in Scotland County v. Hill, 112 U.S. 183, 5 S.Ct. 93, 28 L.Ed. 692. That case dealt with the question of proffers. The Court said in that opinion:

"If the trial court has doubts about the good faith of an offer of testimony, it can insist on the production of the witness and upon some attempt to make the proof before it rejects the offer;

but if it does reject it and allows a bill of exceptions which shows that the offer was actually made and refused and there is nothing else in the record to indicate bad faith, an appellate court must assume that the proof could have been made and govern itself accordingly."

Indeed, the Robinson v. Brady litigation was appealed to the Kansas Court of Appeals, and the Kansas Court of Appeals presumptively assumed that the proffers were accurate in determining that appeal. It therefore was manifestly improper for the Supreme Court of Kansas, in a collateral proceeding, to attempt to establish otherwise. In so doing, this Court's holding in Scotland County was violated, and again the usual course of judicial procedure was ignored.

This Petitioner has been ordered disbarred from state court practice where no clear ethical violation was even clearly charged against him, let alone proven. The most that has been charged and proven is that a reasonable lawyer similarly situated, in retrospect, would not have made certain proffers which this Petitioner made. Such a judgment should not in reason be allowed to stand.

H. Conclusion

The Rules Relating to Discipline of Attorneys, as adopted by the Kansas Supreme Court, and as applied to this Petitioner, violate the United States Constitution. They permitted the filing of a secret complaint against this Petitioner; permitted a secret hearing to be held on that complaint, without opportunity for this Petitioner to have a public hearing on that complaint; and permitted the Supreme Court of Kansas to order disbarment of this Petitioner as a result of that complaint without Petitioner being given notice of the charges against him, without Petitioner being given an opportunity to present evidence on the charges and to cross-examine those complaining against him on the charges, without discovery, without fair notice of the issues, without opportunity to be fully heard upon the issues because of the want of notice, without any hearing "on the merits" before the Supreme Court of Kansas. Such conduct constituted a denial of this Petitioner's procedural due process, substantive due process, equal protection,

and freedom of speech and association.

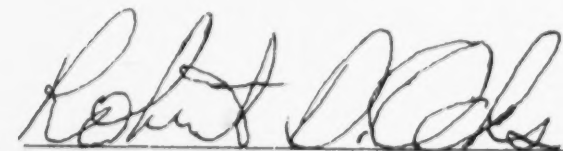
It clearly appears that the procedure effected by the Kansas Supreme Court was so lacking in notice and opportunity to be heard as to constitute a deprivation of due process. It further clearly appears that there was such an infirmity of proof establishing any alleged misconduct such as to cause this Court to have the clear conviction that this Court could not, consistent with its duty, accept as final the conclusion reached by the Supreme Court of Kansas. It further clearly appears that the imposition of the discipline imposed by the Kansas Supreme Court constitutes a grave injustice.

The proceedings have been marked throughout by constitutional infirmities. The chief constitutional infirmity appeared during the proceedings before the Supreme Court of Kansas.

Petitioner again would urge the Court to carefully consider the Complaint lodged with the Clerk of this Court, in Case No. 79-1381. Petitioner further

would sincerely urge this Court to give this Petition for Writ of Certiorari serious and sober consideration because of the grave nature of the violations involved. This Petition, of course, only summarizes the principle areas of concern. The Court will, after granting this Petition, have an opportunity to review the entire record in detail. Petitioner is convinced that this Court realizes the substantial questions at issue, and that this Court will grant this Petition for Writ of Certiorari. Petitioner so prays.

Respectfully submitted,



Robert D. Ochs, Esq., of
FISHER, RALSTON, OCHS
& HECK, P.A.
1321 S. Topeka Blvd.
P. O. Box 1677
Topeka, Kansas 66601
(913) 354-7621
ATTORNEYS FOR PETITIONER

State v. Phelps

No. 50,834

STATE OF KANSAS, *Petitioner*, v. FRED W. PHELPS, SR., *Respondent*.

Disciplinary Proceeding

ORDER OF DISBARMENT

ATTORNEYS—*Disciplinary Proceeding—Disbarment*.

Philip A. Harley, disciplinary counsel, argued the cause and was on the brief for the petitioner.

A. J. "Jack" Focht, of Wichita, argued the cause, and Fred W. Phelps, Jr., of Topeka, and F. G. Manzanares, of Topeka, were with him on the brief for the respondent.

Per Curiam: On March 13, 14 and 15, 1978, a panel of the State Board of Law Examiners held a hearing on a complaint against respondent, Fred W. Phelps, Sr. It filed its report, findings and recommendations on February 12, 1979. The action is before this court pursuant to Supreme Court Rule 212 (224 Kan. lxxxvi-lxxxvii; old rule No. 213, 223 Kan. lxxxiv).

The facts out of which respondent's violations arose are as follows: On May 31, 1974, a preliminary hearing was held in Division One of the Magistrate Court of Shawnee County, Kansas, before Judge Ailan A. Hazlett, wherein the State of Kansas was plaintiff and Sherman Robinson was the defendant charged with a felony and represented by R. W. Niederhauser, attorney. Carolene Brady was the court reporter who took the testimony at the hearing.

On July 15, 1974, Mr. Niederhauser attempted to call Carolene Brady to notify her he needed a transcription of the testimony at the Robinson preliminary hearing, but was informed Brady was on vacation and would not return until August 1, 1974. In the meantime, R. W. Niederhauser had employed Fred W. Phelps, Sr. to try the Robinson case.

On July 31, 1974, Carolene Brady returned from her vacation and on August 5, 1974, she was contacted by Niederhauser about transcribing the testimony from the Robinson preliminary hearing. Mrs. Brady advised Mr. Niederhauser at that time that she was working on a transcript for Russell Shultz of Wichita and she would not be able to provide the Robinson transcript by the date Niederhauser desired it, which was August 9, 1974. Brady told Niederhauser if he could obtain a continuance of the trial she would try to complete the transcript by August 13, 1974, and

State v. Phelps

would call him on August 12, 1974 and report. The continuance to August 13 was obtained.

On August 12, 1974, Brady tried to contact Niederhauser to report she had the testimony dictated onto tape but she couldn't find a typist. Niederhauser was not available when she telephoned so she left word for him to return her call. The call was never returned.

Later on August 12, 1974, Carolene Brady received a telephone call from a female who said she was calling from Phelps' office advising her she'd better have the Robinson transcript ready that day "or else." The person was later identified as Fred Phelps' daughter, Shirley.

Brady next called Fred Phelps, Sr. to notify him, since she couldn't find Niederhauser, that she would be unable to get the testimony typed on time. Phelps responded angrily and told her he had wanted to sue her for a long time. Thereafter, Phelps, on behalf of Robinson, filed a mandamus action in Shawnee County District Court, case No. 125695, and obtained an emergency court order for Carolene Brady to produce the transcribed testimony by 9:00 P.M. August 13, 1974, or to appear August 13, 1974, at 1:30 P.M. and show cause to the contrary. Brady found a Ms. Laird, who picked up the tapes around 4:00 P.M. August 12, 1974, and typed the transcript, taking some 6 hours to complete it. The transcription was delivered to the court at 8:30 A.M. August 13, 1974. Brady appeared at 1:30 P.M. to show cause but no action was taken. Sherman Robinson went to trial on August 14, 1974, and was acquitted.

In spite of the successful termination of the criminal action which set this sequence of events in motion, Robinson or his attorney, Phelps, continued to pursue the mandamus action and, in addition, filed a damage suit against Carolene Brady for fraud and misrepresentation, designated as case No. 125742, in the District Court of Shawnee County, Kansas. The petitioner prayed for \$2,000.00 actual damages and \$20,000.00 punitive damages.

Case No. 125742, the damage suit, was set for trial December 16, 1976, before a jury of six, lasting 8 days. It resulted in a verdict for Carolene Brady. Case No. 125695, the mandamus action, was tried at the same time but to the court. It also resulted in a verdict for Brady.

In both trials, Fred Phelps, Sr. represented Sherman Robinson

State v. Phelps

and tried the case. Fred Phelps, Jr. assisted. The case appeared to be Phelps' personal case. He called the defendant, Carolene Brady, as his witness, had her declared hostile, then proceeded to cross-examine her for 3 or 4 full days. The record discloses that his cross-examination was abusive, repetitive, irrelevant, and represented a classic case of "badgering" a witness. Then he had the temerity to complain that Brady cried in the presence of the jury. Throughout the trial, Phelps made attempt after attempt to adduce testimony concerning Carolene Brady's reputation for truth and veracity, her reputation for competency, the falsification of her income tax return and her morality, or lack thereof.

It is clear from our examination of the record and transcripts in that case that the trial was a personal vendetta by Fred Phelps, Sr. against Carolene Brady. The jury verdict didn't stop the onslaught of Phelps. He was not satisfied with the hurt, pain and damage he had visited on Carolene Brady. He filed a motion for a new trial, the controversial part of which is herewith set out in full:

"1. Erroneous rulings by the Court as follows:

(a) Rejecting the proffered testimony of R. W. Niederhauser, F. G. Manzanares, Jess Danner and Richard Waters as follows: That Messrs. Niederhauser and Manzanares qualified as practicing attorneys to have an opinion as to the conduct of defendant herein, assuming all relevant facts taken in their best light for plaintiff and construed most favorably to plaintiff, that they in fact had an opinion, and that in their opinion defendant's conduct herein was reckless. With regard to the testimony of Jess Danner and Richard Waters, that they qualified as certified court reporters to have an opinion as to the conduct of defendant herein, assuming all relevant facts taken in their best light for plaintiff and construed most favorably to plaintiff, that they in fact had an opinion, and that in their opinion defendant's conduct herein was reckless. Rejecting Niederhauser July 15 and August 1 telephone conversations with one identifying herself as speaking for defendant.

(b) In rejecting the proffered testimony of Ralph J. Hiatt, B. L. Pringle, Patrick Connolly, Dan Turner, Dick Brewster, Rodney Joyce, Patrick Brady, Kathy Fitzgerald and Karen Kennedy, as follows: That each such person had relevant knowledge of the defendant Brady, knew her reputation in the community for truth and veracity, and that such reputation was bad; further, that from their knowledge in the community they had an opinion as to the truthfulness and veracity of defendant, and as to the attitude of defendant toward her oath or other solemn obligation to speak the truth and be bound by any such oath or solemn judicial obligation, and that in their opinion defendant was not a truthful person and had scant regard toward her oath or any such solemn obligation; and further, that they had knowledge of specific instances of conduct by defendant including but not limited to the conduct of defendant when employed as the court reporter

State v. Phelps

for two separate grand jury investigations in Shawnee County, and wherein the defendant Brady had a sworn duty not to reveal such grand jury proceedings to outsiders, and to maintain all such proceedings in strict secrecy, and notwithstanding such bounden and solemn duty under the law, the defendant Brady repeatedly 'leaked' knowledge of such proceedings to certain of those being investigated by such grand jury and who were later indicted by such grand jury including but not limited to: Morris 'Pete' Peterson; Gary Guerrero; Peggy Guerrero; the brother of Governor Robert Docking; and others connected to the so-called 'architectural kickback case'; and further included but not limited to the conduct of defendant in 'leaking' two confidential transcripts taken by Dan Turner in his investigation of a matter involving Bill Glenn, such statements being sworn statements of Kathy Fitzgerald and Karen Kennedy, which statements were taken in secrecy and for which the defendant was bound to secrecy and which were delivered by Mrs. Brady to the news media and consequently published in violation of her solemn oath and duty. Rejecting Appendix 'C' in connection with such proffer.

(c) In rejecting the proffered testimony of Patrick Brady, former husband of the defendant Brady, to the effect that the three children of the defendant, Mike, Karen and Laurie, were in fact living with him (Patrick Brady) and away from the defendant Brady during the years 1974 and 1975, the very years when the defendant Brady swore on her oath to the United States government and the State of Kansas on income tax returns admitted as evidence in this case that each of said three children were in fact living with the defendant Brady in 1974 and 1975 and that the defendant Brady was therefore entitled to claim each of said three children as her personal exemptions for said years, and further, that custody of the son of the parties, Mike, changed from the defendant Brady to Patrick Brady in 1973, and since that time, the son Mike has been living with Patrick rather than the defendant, and that the only remaining minor child of the parties, Laurie, is now in the custody of Patrick Brady and all in contradiction to the sworn testimony of the defendant Brady and constituting substantial impeachment of the defendant Brady and having strong probative value in the instant case going to the critical question of whether Mrs. Brady or Mr. Niederhauser was telling the truth on vital questions of evidence."

The defendant, Carolene Brady, responded to Phelps' motion for a new trial by obtaining and filing affidavits from eight of the witnesses, listed by Phelps, showing they would not testify as Phelps indicated they would. The motion for a new trial was denied and the case was appealed to the Court of Appeals where the judgment of the trial court was affirmed February 17, 1978.

After Phelps had appealed *Robinson v. Brady* to the Court of Appeals, he filed documents to the trial court entitled, "Plaintiff's Reply Affidavits to Defendant's Post-Trial and Post-Appeal Affidavits." The content of the affidavits was so scurrilous that the Court of Appeals ordered its copies expunged as of the date of the opinion and the trial court later expunged its copies from the

record on November 22, 1978. In spite of the court's order of expungement, Phelps attached two of these affidavits to the reply brief filed with this court in the present case, thus successfully making them public documents. These affidavits cast reflections on Carolene Brady's character, wholly outside the issues of either the mandamus action or the fraud and misrepresentation case.

The facts of the case against Carolene Brady were brought to the attention of Arno Windscheffel, the disciplinary administrator, and a formal complaint was filed against Fred W. Phelps, Sr., on November 8, 1977. The complaint alleges the respondent made his proffers of testimony during the *Robinson v. Brady* trial and filed a motion for new trial asserting certain individuals would testify in a certain way as to Carolene Brady's reputation for truth and veracity, for competency and reckless conduct, attitude toward her oath and obligation and for keeping a secret. Further, the complaint noted the affidavits filed by the eight witnesses stating they would not testify as asserted in the motion for new trial. Finally, the complaint alleged Phelps had "[N]o reasonable basis for asserting that the . . . named persons would testify in the manner in which he contends . . . some of the named individuals had told Phelps that they would not so testify."

Respondent answered denying the allegations of the complaint that he made proffers of testimony which were not true and correct to the best of his knowledge, belief and understanding.

A pretrial conference was held February 9, 1978, where the issues were defined as follows:

"3. The panel chairman then states it is his opinion and he rules that the issue in this case is as to whether the Respondent made false statements to the court in his proffered testimony and in his Motion for a New Trial when the Respondent referred to his knowledge of and the nature of the testimony which would be presented by the witnesses named in Paragraphs 1a, 1b and 1c of the complaint. The panel chairman further rules that the issue of the ultimate truth of the proffered testimony is not before the hearing panel but the question is as to whether or not Fred Phelps knowingly made false statements of law or fact as to the testimony of the proffered witnesses; more particularly the issues will be as to whether or not the Respondent violated

1. His oath as an attorney
2. DR1-102A4 - 'Engage in Conduct Involving Dishonesty, Fraud, Deceit or Misrepresentation'
3. Did he violate DR1-102A5 - 'Engage in Conduct that is Prejudicial to the Administration of Justice' and
4. Did he violate DR7-102A5 - 'Knowingly Make False Statement of Fact or Law' and

5. Did he violate Kansas Statute, KSA 60-211 when he affixed his signature to the Motion for a New Trial?"

The disciplinary hearing before the panel was held March 13, 14 and 15, 1978, with trial briefs submitted June 1, 1978. The panel made the following findings:

"The Respondent seeks to vindicate his written Motion for a New Trial by an interpretation of the motion to the effect that not all persons named would testify to all the proffers (TR-527) but that some would testify to each element. The Panel concludes this is a strained construction and interpretation of the writing. Had the Respondent so intended when he wrote the motion, he could easily have used language that would have expressly set forth what each witness would offer in testimony. The Respondent elected to 'lump' the names and proffers and the posthumous explanation is not accepted by the Panel.

"The Panel recognizes that in the trial of a case things may be said inadvertently. Also, we note that the reading of the transcript of the trial of *Robinson v. Brady* makes it difficult to get the full or true meaning of statements by counsel and of ruling by the court. However, the written Motion for a New Trial is of a different character. Here the Respondent was in the quiet of his office; he has spoken with the witness and has been advised by them as to what they will and will not testify; he has opportunity to confer with his co-counsel and with his investigator and informant. At that time he could have and should have taken steps to make certain that his 'proffers' were in fact correct. This would not have been difficult. For example, the Respondent had himself talked to several of the named witnesses and had been personally advised by certain of the witnesses that they could not and would not testify in the manner or to the things set forth in the motion.

"An inquiry to the investigator would have disclosed that (1) he made no written reports of his interviews and that some of the interviews were conducted in 1973 (Tr-418). (2) That Kathleen Fitzgerald had no direct information as to who may have 'leaked' testimony of a secret nature (Tr-419-420). (3) That the informant and investigator had never personally talked to Patrick Brady or Joyce (Tr-423) but he did talk to Joyce by phone and Joyce declined to talk about the reputation of Brady (Tr-424). (4) That he last talked to Joyce in 1973 (Tr-425) and to Brewster in 1973 (Tr-425).

"At the meeting of Respondent and his co-counsel on or about January 2, 1977, when the Motion for a New Trial was prepared, the Respondent knew that certain of the witnesses would not testify as orally proffered, but he made no mention of that fact and in fact prepared and signed the motion with that knowledge in mind.

"Tr-430 (testimony relating to the preparation of the Motion for a New Trial)

'Q. At that time did Mr. Phelps advise you or say anything to you or Mr. Niederhauser or anything that you heard that he had information that Pringle, Connolly, Brewster, Turner and Brady would not so testify as was stated in here?

A. (By Hiett) No.'

"A lawyer is an officer of the court and owes a duty to the court and to his client. DR 1-102 states:

State v. Phelps

'A lawyer shall not

- (4) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation.'

"The Panel finds that the Respondent knew that the witnesses named in the Motion for a New Trial would not each testify as the motion states. This information was made known to the Respondent personally by some of the named witnesses. Further, because of the Respondent's personal involvement in other prior cases and investigations, the Respondent, as an attorney, had a duty to check his sources of information, the accuracy of the information, and the possible prejudice of the informant. The Respondent ignored the warning signals and his own personal knowledge and the Panel finds that his conduct in signing and filing the Motion for a New Trial constitutes a violation of DR 1-102(A)(4) and also a violation of DR 1-102(A)(5) in that he did engage in conduct that is prejudicial to the administration of justice.

"A lawyer is an advocate and he has a duty to represent his client zealously. But, he must do so within the bounds of the law. DR 7-102 states:

'A - In his representation of a client, a lawyer shall not

- (5) Knowingly make false statements of law or fact.'

"The Panel finds that the Respondent had personal knowledge prior to the time the oral proffers were made and prior to the time the written Motion was filed that some or all of the named witnesses would not testify in the manner and to the things as stated in the proffers and in the Motion for a New Trial. It is apparent to the Panel that the Respondent was relying on innuendos and deductions and the hope that the witnesses, if called to the stand, might change their testimony. But the Respondent does not so state in his proffers or in the motion. The Respondent chose to ignore the direct testimony he had personally received and to accept the statements of his investigator and informant. The Panel finds that the Respondent did knowingly make false statements of fact and did violate DR 7-102(A)(5).

"The Panel further finds that when the Respondent signed the Motion for a New Trial, he knew of his own knowledge that certain of the statements therein made were not true and that the witnesses would not so testify and that by signing the pleading he thereby violated KSA 60-211, and that the signing of the Motion by the Respondent was a wilful act.

"Beyond these specific findings, the testimony in this case and the reference to prior related cases disclose a course of conduct by the Respondent that indicates the Respondent may have ceased to be an advocate for his client and may be embarked upon a personal vendetta against some persons and is using his position as a lawyer as a weapon. We do not make such a specific finding. However, we do call the attention of the Respondent to DR 7-102 (a) [sic] (1):

'In his representation of a client, a lawyer shall not file a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows that such action would serve merely to harass or maliciously injure another.'

We merely suggest to the Respondent that he might well take a critical look at his tactics and policy and procedures in his utilization of his license as a lawyer and answer truthfully to himself the question - 'Am I fulfilling my duty as a lawyer?'

"The Panel has received and has reviewed and studied the briefs prepared and filed by counsel for the State and counsel for the Respondent. They are most

State v. Phelps

helpful. Unfortunately, there are not many decided cases upon the points we are now considering. Most of the cases deal with the application of Federal Rule 11, our KSA 60-211. The case of *Miller v. Schweickart*, 413F Supp (1059) (1061) (USDC-SDNY-1976) is cited by both counsel and thoroughly dissected. It involved a complaint in a class action and the Court said

'Lawyers have a responsibility before subscribing their name to complaints which contain serious charges to ascertain that a reasonable basis exists for the allegations, even if they are made on information and belief — Unverified hearsay based on rumor is not sufficient upon which to subject one to the burdens of complex litigation and heavy legal costs. (underlining added)'

We recognize this case is not directly in point for it refers to a complaint and not a motion or subsidiary pleading. But, we are of the opinion the wording is peculiarly applicable to this case. The Respondent contends he did have a reasonable basis for his allegations, namely a co-counsel, his investigator and informant, and a third party. But, the inferences and innuendos and conclusions of those parties had been directly controverted by certain of the witnesses named by the Respondent in his Motion for a New Trial. The Respondent chose to ignore the direct negation by the witness, of which he had personal knowledge, and based his affidavit upon the erroneous information given to him by those whom he chose to believe.

"We point out that KSA 60-211, which refers to pleadings is made applicable to all 'motions and other papers' by KSA 60-207(B). See also Fed Rule 11 and 7 and U.S. ex rel *Foster Wheeler Corp v. American Surety Co.* 25 F Supp 225 (EDNY-1938) and *Wright & Miller Fed Practice & Procedure*, Vol 5, Par 1332.

"And in the article 'Honesty in Pleading and its Enforcement' by D. Michael Risinger, *Minnesota Law Review* - 1976, Vol 61, Page 1 of his conclusion, the author states with respect to Rule 11 (KSA 60-211)

'Rule 11 seeks to obtain honesty in pleadings by requiring the signature of an attorney and by requiring that there be good ground to support the document signed. Good ground cannot exist as to any alleged proposition known to be false, including a denial; further, an attorney must engage in reasonable investigation to determine the probability of any proposition he proposes to allege in a pleading or other document. (underlining added)'

"We cannot accept the Respondent's argument of 'reasonable basis' when certain of the named witnesses had personally advised the Respondent that they had no knowledge or information on the matters sought to be elicited or that they would not testify as stated by the Respondent in the affidavit.

"We have also considered Respondent's procedural objections and contentions. In our opinion the issue is not whether the trial court was misled but rather is whether the Respondent knowingly made false statements to the Court in his Motion for a New Trial, and we have found from the evidence that the Respondent did knowingly make such false statements."

We have said a disciplinary action is more serious than a civil action, *State v. Johnson*, 219 Kan. 160, 546 P.2d 1320 (1976), and charges must be established by substantial, clear, convincing and satisfactory evidence. *State v. Hoover*, 223 Kan. 385, 574 P.2d 1377 (1978); *State v. Johnson*, 219 Kan. 160. In addition, it is well

established the Board's findings and recommendations are advisory only and are not binding on the court. *State v. Johnson; In re Phelps*, 204 Kan. 16, 459 P.2d 172 (1969), *cert. denied* 397 U.S. 916 (1970). This court has the duty in a disciplinary action to examine the evidence and determine for ourselves the judgment to be entered. *State v. Klassen*, 207 Kan. 414, 485 P.2d 1295 (1971).

We have carefully and painstakingly reviewed the voluminous transcripts and exhibits and conclude there is clear and convincing evidence to support the panel's finding that the respondent violated: DR 1-102(A)(4); DR 1-102(A)(5); DR 7-102(A)(5); and K.S.A. 60-211.

In addition, a study of the transcripts, particularly that of the trial of *Robinson v. Brady*, convinces us that Fred W. Phelps, Sr. meant it when he told Carolene Brady he had wanted to sue her for a long time. The trial became an exhibition of a personal vendetta by Phelps against Carolene Brady. His examination was replete with repetition, badgering, innuendo, belligerence, irrelevant and immaterial matter evidencing only a desire to hurt and destroy the defendant. We note the panel's discussion of DR 7-102(A)(1) and its observation that the record and testimony show "a course of conduct by the Respondent that indicates the Respondent *may* have ceased to be an advocate for his client and *may* be embarked upon a personal vendetta against some persons and is using his position as a lawyer as a weapon." (Emphasis added.) The panel declined to make such a specific finding. We, however, are not bound by the failure to make such a finding. The formal complaint lodged against Phelps states: "That the Motion for New Trial (Attached J) clearly misrepresents the truth to the court and holds a defendant up to unnecessary public ridicule for which there is no basis in fact." We have examined the record and transcripts from *Robinson v. Brady*, which were made exhibits by the panel and are properly before this court as part of the record in the disciplinary case. This record unquestionably supports a finding that Phelps' action in filing the motion for new trial attempted to hold Mrs. Brady up to unnecessary public ridicule. Additionally, we find the entire record before us clearly supports a violation of DR 7-102(A)(1).

Respondent claims he was denied due process when the panel denied his motion for discovery. We find the panel's ruling

correct. The panel hearing is a type of discovery, with lenient rules to permit respondent to present any defense he might have to the complaint. Respondent relies upon *Brotsky v. State Bar*, 57 Cal. 2d 287, 368 P.2d 697, 19 Cal. Rptr. 153 (1962), to support his claim. This case, however, recognizes the existence of a California state statute allowing discovery in this type of proceeding. See Cal. Bus. & Prof. Code § 6085 (West). Kansas law is distinguishable because we have no statutory requirements for discovery under such circumstances. Additionally, we note with approval a recent Indiana case holding denial of discovery in a disciplinary proceeding is not an unconstitutional denial of due process. *Matter of Murray*, 362 N.E.2d 128 (Ind. 1977). We find the respondent had proper notice of the nature and extent of the complaint and that the hearing was fairly and properly conducted by the panel.

Respondent argues his motion for a new trial and allegations therein referring to proffered evidence are no more than a normal proffer. We do not agree. An oral proffer during the course of a trial is made for the purpose of preserving the record. K.S.A. 60-243(c). The reference to witnesses and their testimony in a motion for a new trial is an attorney's representation to the court that a new trial should be granted because of the quality of proof available. The motion is prepared in the attorney's office and should be carefully and studiously drafted. It is an attorney's representation to the court and is contemplated by K.S.A. 60-211.

The final determination for the court is the proper discipline for respondent's violations of the Code of Professional Responsibility. In this regard, we note it is proper to consider an attorney's previous record concerning professional conduct. *State ex rel. Okl. Bar Ass'n v. Hensley*, 560 P.2d 567 (Okla. 1977). See also *Selznick v. State Bar*, 16 Cal. 3d 704, 547 P.2d 1388, 129 Cal. Rptr. 108 (1976). Phelps was suspended from practicing law for a period of two years for unprofessional conduct in 1969. *In re Phelps*, 204 Kan. 16. The seriousness of the present case coupled with his previous record leads this court to the conclusion that respondent has little regard for the ethics of his profession. In his attorney's oath, Fred W. Phelps, Sr. swore as follows:

"You do solemnly swear that you will support and bear true allegiance to the Constitution of the United States and the Constitution of the State of Kansas; that you will neither delay nor deny any man his right through malice, for lucre, or from any unworthy desire; that you will not knowingly foster or promote, or give

State v. Phelps

your assent to any fraudulent, groundless or unjust suit; that you will neither do, nor consent to the doing of any falsehood in court; and that you will discharge your duties as an attorney and counselor of the Supreme Court and all inferior courts of the State of Kansas with fidelity both to the court and to your cause, and to the best of your knowledge and ability. So help you God." Rule No. 702 (h) (224 Kan. cxxxviii).

He has disregarded that oath, and violated the Code of Professional Responsibility and K.S.A. 60-211. The practice of law is a privilege rather than a right and by his conduct, respondent has forfeited his privilege. We find he should be disciplined by disbarment and assessed the costs of this action.

BY ORDER OF THE COURT, dated this 20th day of July, 1979.

RULE NO. 7.06

Rehearing of Modification in
Supreme Court

(a) A motion for rehearing or modification in a case decided by the Supreme Court may be served within twenty (20) days of the date of the decision. The issuance of the mandate shall be stayed pending the determination of the issues raised by such a motion. If a rehearing is granted, such order suspends the effect of the original decision until the matter is decided on rehearing.

(b) If no motion for rehearing is filed or upon denial of a motion for rehearing, the Clerk of the Appellate Courts shall, unless the Court otherwise orders, issue a mandate on the decision of the Supreme Court to the District Court together with a copy of the opinion.

IN THE SUPREME COURT
OF THE STATE OF KANSAS

STATE OF KANSAS,)
)
) Petitioner,)
)
) v.) Case No. 50,834
)
 FRED W. PHELPS, SR.,)
)
) Respondent.)

You are hereby notified of the following
action taken in the above entitled case:

Amended Motion for Stay.

The Motion to Stay the Order of Disbar-
ment, entered July 20, 1979, is denied.

Yours very truly,

Lewis C. Carter
Clerk, Supreme Court

Date: August 30, 1979

APPENDIX "C"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

FRED W. PHELPS, SR.,)
)
) Plaintiff,)
)
) vs.) NO. 79-1381
)
 THE KANSAS SUPREME COURT,)
 THE HONORABLE ALFRED G.)
 SCHROEDER, THE HONORABLE)
 ALEX M. FROMME, THE)
 HONORABLE DAVID PRAGER,)
 THE HONORABLE ROBERT H.)
 MILLER, THE HONORABLE)
 RICHARD M. HOLMES, THE)
 HONORABLE KAY McFARLAND,)
 and THE HONORABLE HAROLD)
 S. HERD, Each in His/Her)
 Capacity as Justice of)
 the Kansas Supreme Court;)
 THE HONORABLE ARNO WIND-)
 SCHEFFEL, in His Capacity)
 as Disciplinary Administra-)
 tor of the Kansas Supreme)
 Court, and THE STATE OF)
 KANSAS,)
)
) Defendants.)

FILED
AUG 17 1979
ARTHUR G.
JOHNSON, Clerk
By H. Hope,
Deputy
[Stamp]

ORDER GRANTING MOTION FOR PRELIMINARY
INJUNCTION IN PART AND DENYING THE
BALANCE THEREOF

The Application for Preliminary Injunc-
tive Relief, filed herein by the Plaintiff,

APPENDIX "D"

coming on to be heard on August 10, 1979, Plaintiff appearing in person and by his attorneys, Charles S. Fisher, Jr., Esq., of Fisher, Ralston, Ochs, & Heck, and Herbert B. Newberg, Esq., and the Defendants appearing by their attorneys, Bruce E. Miller, Esq., Deputy Attorney General of the State of Kansas, and Philip A. Harley, Esq., Special Assistant Attorney General of the State of Kansas, and the Court having heard the arguments of counsel and being fully advised in the premises finds that said application should be allowed as to the requirement of Rule 219 of the Rules of the Supreme Court of Kansas that an attorney disbarred or suspended from the practice of law shall forthwith notify each client or person represented by him and the Court or administrative body in pending matters of his inability to undertake further representation of each client and in such matter and to notify each client to obtain other counsel in such matters, and as to all other matters therein should be disallowed, except as regards the Plaintiff's license to practice law before the federal courts of the District

of Kansas, and the Court having found that the Plaintiff may suffer irreparable harm and injury if enforcement of said Rule is not stayed during the pendency of this action, in that said Rule would require notice to be given to each client of the firm of which Plaintiff is a member and may result in a loss of legal business to the other members of said firm, and it further appearing that the Supreme Court of Kansas has not had an opportunity to rule upon the Plaintiff's Motion for a Stay of its Mandate; now, therefore, it is

ORDERED that the Plaintiff, Fred A. [sic] Phelps, sometimes known as Fred W. Phelps, Sr., be and he hereby is relieved, during the pendency of this action from compliance with Rule 219 of the Supreme Court of Kansas and that enforcement of the Mandate of said Court be suspended in that regard only during the pendency of this action, or until further order of this Court; and that the Plaintiff's Application for Preliminary Injunctive Relief be denied in all other particulars; it is further

ORDERED that during the pendency

of this action no proceedings in the
United States District Court of Kansas
be undertaken toward disbarment of
Plaintiff from the federal courts,
pending the outcome of this litigation.

Dated this 10th day of August, 1979.

/s/ Clarence E. Brimmer
U.S. DISTRICT JUDGE - Presiding